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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND McCLANAHAN,
on behalf of herself and all others
similarly situated,
Appellant,

vs.

ARIZONA STATE TAX
COMMISSION,
Appellee.

On Appeal
From The
Supreme Court of
Arizona

BRIEF OF THE NAVAJO TRIBE OF INDIANS, AS AMICUS CURIAE, IN SUPPORT OF JURISDICTIONAL STATEMENT

Counsel for the parties have consented in writing to the filing of a brief in this case on behalf of the Navajo Tribe of Indians, as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The Navajo Tribe of Indians, the Nation's largest, occupies and controls a reservation including portions of three states. It is the Tribe of which Appellant here is an enrolled member; it was from within the Navajo Reservation that Appellant earned the income which the State of Arizona seeks to tax. It is on the

Navajo Reservation that Arizona seeks to impose its income tax law.

Because of the Navajo Tribe's concern for the economic welfare of its people, the Navajo Tribe believes that the application of Arizona's income tax laws to its people and its Reservation will have an untoward economic impact not considered by the Arizona taxing authorities or the Arizona courts. At the individual level, as this Court noted in *Williams v. Lee*, 358 U.S. 217, 222 n. 9 (1959), illiteracy and poverty characterize the plight of many Navajos. Those conditions prompted a President of the United States and later the United States Congress to abandon a program to subject Navajos to state jurisdiction. *Id.*

Although the Navajo Tribe has not subjected its many illiterate poor to a tribal income tax, the courts of two states, Arizona and New Mexico, portions of which are included within the Navajo Reservation, have sustained state assertions of income taxing power over those individual Navajos. See *McClanahan v. State Tax Comm'n*, 14 Ariz.App. 452, 484 P.2d 221 (1971); *Kahn v. Arizona State Tax Comm'n*, 490 P.2d 846 (Ariz. Ct. App. 1971); *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (1969). The rulings of those courts conflict with the ruling of the Minnesota court in *Commission of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970). Without an authoritative resolution of the matter by this Court, the result for the Navajo Tribe and its people, as for other Indian Tribes and their members, is confusion.[1]

The focus in the Arizona Court of Appeals' decision on the rights of the Navajo Tribe to be self-governing rather than on any infringement on Appellant's rights as an individual Navajo

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[1]The national significance of the problem has prompted several critical analyses of the existing decisions. *See* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 Calif.L.Rev. 1261, 1285-1286 (1971); Comment, *State Taxation of Indian Income*, 1971 Law & Soc. Order 355; Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 Willamette L.J. 515 (1970).

requires a presentation of the position of the Navajo Tribe. Although Appellant, both before this Court and the state courts, has attempted vicariously to present the position of the Navajo Tribe, *amicus curiae* believes that the parties have insufficiently stressed those policies, supported by the Navajo Tribe, which Congress embodied in Title IV of the 1968 Civil Rights Act, 82 Stat. 78 (1968), 25 U.S.C. §§ 1321-1326 (Supp. 1971). Preliminarily, the Navajo Tribe emphasizes its long-time policy of encouraging negotiation with state officials on matters of state and Tribal jurisdiction[2] and the simultaneous opposition by the Navajo Tribe to unilateral state assertion of jurisdiction over Indian reservations, without the consent of the Indians affected.[3] Those policies appear especially relevant to the dispostion of this appeal because Congress incorporated them into federal law and because following the congressionally prescribed procedure assures that the needs and special circumstances of the Navajo people will be considered by State officials, with the result that the application of State law to Reservation Indians will accord with an elementary principle of our Nation's government, obtaining the consent of the governed.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL FEDERAL QUESTIONS.

The Arizona, Minnesota and New Mexico courts appear to have recognized the same test: whether the state income tax laws

[2]See, *e.g.*, Statement of Paul Jones, Former Chairman, Navajo Tribal Council, reported in *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 851-71 (1964).

[3]That opposition, shared by leaders of other Indian Tribes, bulked large in persuading Congress to enact Title IV of the Civil Rights Act of 1968, 82 Stat. 78 (1968), 25 U.S.C. §§ 1321-1326 (Supp. 1971). See S.Rep. No. 841, 90th Cong., 1st Sess. 11-12 (1967), accompanying S. 1843, 90th Cong., 1st Sess. (1967) [hereinafter "Senate Bill 1843"], a bill which passed the Senate, 113 Cong. Rec. 35471-35477 (1967) and was then adopted as an amendment to the Dirksen amendment to the 1968 Civil Rights Act. See 114 Cong. Rec. 5836-5838 (1968). Title III of Senate Bill 1843 became Title IV of the 1968 Civil Rights Act.

infringed on the right of reservation Indians to make their own laws and be ruled by them. *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 456-57, 484 P.2d 221, 224-26 (1971); *Kahn v. Arizona State Tax Comm'n*, 490 P.2d 846, 849 (Ariz. Ct. App. 1971; *Commission of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970); *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002, 1004 (1969). While the Arizona and New Mexico courts sustained the state taxing power, the Minnesota court rejected it.

The tests formulated by the state courts purportedly derive from this Court's statement in *Williams v. Lee*, 358 U.S. 217, 220 (1959):

> "Essentially, *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." (Emphasis added)

Significantly, in this case, the Arizona Court of Appeals' quotation from *Williams v. Lee, supra*, omitted the phrase, "absent governing Acts of Congress . . . ." *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 484 P.2d 221, 223 (1971).

This Court only last term reemphasized the importance of first determining the applicability of acts of Congress. *Kennerly v. District Court of Ninth Jud. Dist. of Montana*, 400 U.S. 423, 91 S.Ct. 480 (1971). Although that case, like *Williams v. Lee, supra*, involved the jurisdiction of a state court over a reservation Indian in an action by a non-Indian, this Court's decision did not apply the infringement of the right of tribal self-government test. Indeed, the Tribal Council resolution there permitting state courts to have concurrent jurisdiction over actions involving Tribal members suggested no infringement on Tribal self-government. Instead, this Court's decision cited a "governing act of Congress," § 7 of the Act of August 15, 1953, 67 Stat. 590, held that the applicable Congressional act rendered Tribal action entirely immaterial and found that because the state had not followed the

procedure prescribed by Congress, the state court had no jurisdiction.

In conjunction, the cited decisions of this Court teach that if an act of Congress applies to the assertion of state power over reservation Indians, the question is whether the state action conforms with the act of Congress, without regard to whether state action infringes on tribal self-government.

Such a governing act of Congress controls the disposition of this case. The statutes involved are sections 402(a) and 406 of Title IV of the Civil Rights Act of 1968, 82 Stat. 79, 80, 25 U.S.C. §§ 1322(a), 1326 (Supp. 1971), which provide as follows:

"(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.*" (Emphasis added)

"State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country *only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction* by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults." (Emphasis added)

That portion of § 402(a) italicized above amounts to con-

gressional authorization for the assertion of state legislative power over reservation Indians. However, as the portion of § 406 italicized above indicates, there can be no such assertion of state legislative power until a majority of the enrolled Indians accept that jurisdiction in a special election. Additionally, under § 404 of the Act, 82 Stat. 79 (1968), 25 U.S.C. § 1324 (Supp. 1971), Congress deferred the assumption of jurisdiction by a state under the Act "until the people thereof have appropriately amended their State constitution or statutes . . . ." The assertion here by Arizona of its income taxing power on the Navajo Reservation has not been preceded by either a special election of the Navajo people to accept that jurisdiction or an amendment by the people of Arizona of Ariz. Const. Art. 20, para. 4.[4]

Without the acceptance by the Navajo people of state jurisdiction at a special election and without the amendment by Arizona of its Constitution, the State's assertion of income taxing power on the Navajo Reservation must fail because there has been no compliance with that procedure which Congress made exclusive. Both this Court's decision in *Kennerly v. District Court of Ninth Jud. Dist. of Montana*, 400 U.S. 423, 91 S.Ct. 480 (1971), and the legislative history of Title IV of the 1968 Civil Rights Act demonstrate the exclusivity of that procedure. In *Kennerly*, this Court described Title IV of the 1968 Civil Rights Act as having "substituted a new regulatory scheme for the extension of state civil and criminal jurisdiction to litigation involving

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[4] Ariz. Const. Art. 20, para. 4, *in pari materia* with the Arizona Enabling Act, § 20, 36 Stat. 569 (1910), discussed below, provides:

"Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within such boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Indians arising in Indian country."[5] 91 S.Ct. at 482-483. In *Kennerly*, this Court also found that the Tribal resolution had not vested the state courts with jurisdiction despite the terms of the Tribal resolution because Congress had required a majority vote of the enrolled Indians as a "prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act . . . ." 91 S.Ct. at 483. The exclusivity of the congressional procedure was emphasized by the dissenting opinion in *Kennerly* which attributed to the Court a holding that Congress had specified "the *exclusive* procedure by which reservation Indians may confer on a state court jurisdiction over them." (Emphasis added). 91 S.Ct. at 484.

During the discussion of Title IV of the 1968 Civil Rights Act, the sponsor of the Act, Senator Ervin of North Carolina stated on the Senate floor:

> "This title repeals section 7 of Public Law 280, 83d Congress (67 Stat. 588) and authorizes States to assert civil and criminal jurisdiction in Indian country *only after* acquiring the consent of the Tribes in the States by referendum of all reservated Indians." (Emphasis added) 114 Cong. Rec. 394 (1968).

Senator Ervin expressed similar views in the Committee Report on the 1968 Civil Rights Act. S.Rep.No. 721, 90th Cong., 1st Sess. 32 (1967). Senator Ervin's views resulted from a series of hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary in the consideration of Senate Bill 1843. S.Rep.No. 841, 90th Cong., 1st Sess. 5 (1967). As that Senate Committee stated, Tribal leaders had criticized Public Law 83-280, § 7 of the Act of August 15, 1953, 67 Stat. 590, because that statute authorized "unilateral application of state law" to Indian tribes "without their consent and regardless

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[5] As this Court also stated in *Kennerly*, 91 S.Ct. at 481, before enactment of Title IV of the Civil Rights Act of 1968:

"state assumption of civil jurisdiction — in situations where Congress had not explicitly extended jurisdiction — was governed by § 7 of the Act of August 15, 1953, 67 Stat. 590." (footnote omitted)

of their needs or special circumstances." Title III of Senate Bill 1843, which later became Title IV of the 1968 Civil Rights Act, was intended to respond to that criticism by repealing Public Law 83-280 and by substituting therefor the Subcommittee's recommendation that there be "Tribal consent as a precondition of the State's assumption of jurisdiction . . . ." S.Rep.No. 841, 90th Cong., 1st Sess. 11-12 (1967).

The unilateral assertion here by Arizona of its income taxing power on the Navajo Reservation presents, then, the precise situation about which Tribal leaders had complained to Congress and which Congress, by enacting Title IV of the 1968 Civil Rights Act, intended to prohibit. That assertion of power should, therefore, fall because it conflicts with supreme federal law.

The State's assertion of power also conflicts with another federal law, § 20 of the Arizona Enabling Act, 36 Stat. 569 (1910), in which the State of Arizona forever disclaimed:

> ". . . all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished *the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States* . . . ." (Emphasis added).

Unlike the Arizona Court of Appeals, which found the disclaimer in Arizona's Enabling Act to deal with title to Indian land [*McClanahan v. State Tax Comm'n*, 14 Ariz.App. 452, 484 P.2d 221, 225 (1971)], this Court has referred to the disclaimer in the broader sense of denying the State jurisdiction. *Williams v. Lee*, 358 U.S. 217, 223, n. 10 (1959) ("Arizona has an express disclaimer of jurisdiction over Indian lands . . . .") See also *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965).

Although this Court concluded that the provisions in Alaska's Enabling Act were not intended "to oust the State completely from regulation of Indian 'property (including fishing rights)' ", *Organized Village of Kake v. Egan*, 369 U.S. 60, 71 (1962), that statement, applied to non-reservation Indians, was prompted by legislative history showing that Alaska was not to be deprived of political jurisdiction. *Id.* at 69-71.

The classic pronouncement by this Court on the effect of a disclaimer is that in the *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). There, explaining that the State of Kansas could not tax real property held in trust for the Shawnee Indians, the Court referred to the provisions of the Kansas Enabling Act, stating:

> "If under the control of Congress, from necessity, there can be no divided authority. . . . There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union." *Id.* at 755-756.

Arizona's assertion of taxing power on the Navajo Reservation also conflicts with the congressional policy expressed in the Buck Act, 61 Stat. 641 (1947), 4 U.S.C. §§ 101-110 (Supp. 1971). Congress there defined the term "Federal area" to mean "any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States . . . ." 25 U.S.C. § 110(e) (Supp. 1971). Although the Buck Act permits states to levy and collect income taxes within a federal area [4 U.S.C. § 106(a) (Supp. 1971)], the Act specifically denies states authorization for "the levy or collection of any tax on or from any Indian not otherwise taxed." 4 U.S.C. § 109 (Supp. 1971). Referring to decisions about the impact of the Buck Act on state taxing power over Indian reservations, this Court approved as "correct" an interpretation denying states con-

gressional authorization to levy and collect taxes on Indian reservations. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 n. 18 (1965).

As this Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and Congress' enactment of the Buck Act confirmed, Indian reservations are federal enclaves. The decisions involving state taxes within federal enclaves hold that a state may not levy its taxes within a federal enclave without congressional authorization. *Humble Pipeline Co. v. Waggonner*, 376 U.S. 369 (1964) (invalid Louisiana ad valorem tax on privately owned property on an Air Force field); *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). *Cf. Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (state could not regulate activities on land ceded to the United States); *United States v. Kagama*, 118 U.S. 375 (1886) (state could not try reservation Indians for criminal offenses). As this Court explained in *Humble Pipeline Co. v. Waggonner, supra:*

> "When Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within federal enclaves, it has specifically so stated, as in the Buck Act, 4 U.S.C. §§104-10." 376 U.S. at 374.

CONCLUSION

Without congressional authorization and without the consent of the Navajo people to be affected, the State of Arizona unilaterally sought to apply its income tax laws to individual Navajos on the Navajo Reservation. In so doing, the State completely ignored the exclusive procedure provided by Congress in Title IV of the 1968 Civil Rights Act. The State also ignored the congressional policies forbidding state intrusion in the affairs of reservation Indians as evidenced by the Buck Act and the Arizona Enabling Act. Since the decisions of this Court require states to conform with the provisions of applicable supreme federal law, the State's assertion of power here should not be allowed to stand. The judgment of the

state courts dismissing Appellant's complaint was, therefore, erroneous and should be reversed.

Respectfully submitted,

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